INDEX

CITATIONS

Cases:

656588—62——1

Cases—Continued.

Statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 746

A. L. MECHLING BARGE LINES, INC., A CORPORATION, IRA BOOKWALTER, CULLOM COOPERATIVE GRAIN COMPANY, CHARLES TREASURE, GRISWOLD GRAIN COMPANY, AND MAZON FARMERS ELEVATOR, APPELLANTS

v.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, APPELLEES

No. 747

BOARD OF TRADE OF THE CITY OF CHICAGO, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, Appellee Interstate Com-

merce Commission moves that the judgment of the district court be affirmed.[1]

STATEMENT

This is a direct appeal from a final judgment entered on September 18, 1962, by a three-judge district court convened pursuant to 28 U.S.C. 2284, 2325, dismissing a complaint seeking to set aside and enjoin an order of the Interstate Commerce Commission entered June 8, 1960, in Fourth Section Application No. 33955, *Corn and Corn Products from Illinois to Official Territory*, 310 I.C.C. 437.[2]

The New York Central Railroad Company operates a rail line between Kankakee, Illinois and Moronts, Illinois called the Kankakee Belt Line. The Belt Line is about 80 miles long, and roughly parallels the Illinois River. Appellant A. L. Mechling Barge Lines, Inc. operates on the Illinois River and transports a substantial amount of corn from the adjacent territory to Chicago where it is reshipped to eastern destinations. Corn constitutes the major traffic available to the Belt Line from the surrounding area. (M.J.S. App. C pp. 440–448).[3] The transportation rate is one of the important factors which determines whether the corn is moved to the river for shipment

[1] This motion to affirm is filed at the request of the Court made April 15, 1963.

[2] The order of the Commission resulting from this proceeding is designated as Fourth Section Order No. 19346, *Corn and Corn Products from Illinois to Official Territory*.

[3] M.J.S. refers to jurisdictional statement of appellant A. L. Mechling Barge Lines, Inc.

B.J.S. refers to jurisdictional statement of appellant Board of Trade of the City of Chicago.

by water carrier such as appellant Mechling, or to a country elevator for shipment by rail.

As a direct result of the development of commerce on the Illinois River beginning about 20 to 25 years ago, there was a drastic diversion of grain and corn traffic originating in the territory adjacent to the Belt Line, from the all-rail route to the barge-rail route via Chicago, Illinois. Thus, the Commission found that "In 1935, 1940 and 1957, respectively, about 1.5, 19, and 59 million bushels of grain including 0.7, 16, and 34 million bushels of corn, moved by barge from all Illinois River ports to Chicago." (M.J.S. App. C, page 440). Most of the corn moved by barge originated at ten river ports on the Illinois River which compete with the Belt Line stations. In comparison to the enormous increase in the barge movement of grain and corn, only a nominal amount moved over the Belt Line. "During 1954, 1955, and 1956, respectively, 467, 729, and 615 carloads of grain including 305, 533, and 464 carloads of corn originated thereat.[4] Most of it was Commodity Credit Corporation corn [government controlled] which is usually shipped by rail for export, and is not subject to the same competitive forces as 'free' corn." (M.J.S. App. C, p. 440).[5] The export rates are lower than the combination domestic rates. (M.J.S. App. C, p. 448).

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[4] Corn averages about 50 pounds to the bushel. A carload of corn based upon 100,000 pounds equals 2,000 bushels. The average number of bushels of corn moved during the years 1954, 1955, 1956 amounts to 868,000 bushels.

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The determinative factor in the selection of the mode of transportation prior to December 15, 1956, was the much lower local barge rate of approximately 4.625 cents applicable from competing river ports to Chicago compared with the flat rate of 23 cents from stations on the Belt Line to Chicago.* Although the reshipping rate on corn products from Chicago and Kankakee is the same, *i.e.*, 49.5 cents, the barge-rail combination produced a rate of 54.125 cents compared to the much higher combination all-rail rate of 72.5 cents. Hardly any corn traffic could be attracted to the Belt Line under such rate conditions, and the all-rail rate simply became a "paper" rate.

In an effort to revive the Belt Line's participation in the corn traffic, The New York Central in December 1956 established a competitive proportional rate of 5 cents (now 6 cents because of general rate increases) minimum 100,000 pounds applicable on corn and corn products when milled in transit from Belt

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river. The status of the country elevator operators changed to buyers or merchandisers of corn for barge movement. (M.J.S. App. C, pp. 441-442, 451). The lack of competitive rail rates tended to give the water carriers a monopoly on the movement of the considered traffic. This seriously affected the farmers since they were deprived of the benefits resulting from competitive bids. After the new rate became effective farmers received much more than they had received previously. For example, a farmer at the country elevator located at Blair, Illinois received at least 8.75 cents a bushel more for his corn than he was able to obtain prior to the effective date of the challenged rate. (M.J.S. App. C, p. 445.)

*The rate diagrams at p. 6 of the Board of Trade's jurisdictional statement conveniently omits any reference to the lower local barge rates. However, these rates are discussed by the Commission in its report. (M.J.S. App. C, pp. 439-440.)

Line stations west of Kankakee to Kankakee for final destination at points east of the western termini of eastern trunk line carriers.[7] The proportional rate had no independent application but could only be used in conjunction with the existing reshipping rates beyond Kankakee as a factor in determining the ultimate through rates on corn products.[8] The lawfulness of the new proportional factor was not challenged and it became effective as scheduled. The rates have been in effect for 5½ years.

Initially it was believed that any departures from the long-and-short haul provisions of section 4(1) of the Interstate Commerce Act, 49 U.S.C. § 4(1) resulting from the application of the new proportional rate would be covered by existing Fourth Section Orders of the Commission. However, it was subsequently discovered that this was not the case and that additional authority was necessary. On June 27, 1957, the New York Central filed an application for fourth section relief with the Commission. The relief requested would permit the continuance or establishment and maintenance over existing all-rail routes, of reduced rail rates consisting of a combination of proportional rates from origins west of Kankakee on the

[7] This would include points in New York, Pennsylvania, West Virginia, the New England States, Delaware, the District of Columbia, Maryland, New Jersey and Virginia.

[8] A "proportional rate" is a part of a through rate, *Hocking Valley Ry. Co.* v. *Lackawanna Coal & Lumber Co.*, 224 Fed. 930, 931, and is a rate dependent for application upon (1) a previous transportation to the point from which the proportional rate applies or (2) a subsequent transportation from a point to which the proportional rate applies, (3) or both, cf. *Addy* v. *Michigan Central R. Co.*, 269 I.C.C. 683, 686.

Belt Line to points in the territory noted in footnote 7, *supra*, and to charge higher rates at intermediate points which are not subject to the same competitive forces. The application also was intended to cover a subsequent rate revision, effective August 29, 1957, designed to eliminate unauthorized destination departures. (M.J.S. App. C, p. 439).

In accordance with the Commission's established initial rate procedure, the appellants filed protests against the fourth section application urging that the relief be denied. In addition, the appellants challenged the lawfulness of the proposed rate revision effective August 29, 1957 under other sections of the Interstate Commerce Act such as sections 1 and 3. They requested that the Commission invoke its discretionary investigation and suspension authority under section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7). The New York Central filed a reply to the protests.[8]

The matter of the fourth section application received initial consideration by a board of employees of the Commission known as the Fourth Section Board. The requests for investigation and suspension of the proposed rate revision were given initial consideration by another board of employees called the Board of Suspension.

The Board of Suspension, acting first on August 26, 1957, decided not to institute an investigation and to suspend the proposed rate revision. The notice

[8] Significantly the Commission received two dozen letters and telegrams from grain and elevator companies and local banks in support of the competitive all-rail rate revision.

of the Board of Suspension specifically states *"This action does not constitute approval of the protested schedules. They may be made subject to investigation through formal complaint filed in accordance with the Commission's Rules of Practice."* [10] Upon the completion of its investigation, the Fourth Section Board entered a fourth section order on August 27, 1957, granting the relief sought pending a hearing. The order of the Fourth Section Board also stated *"The Commission does not hereby approve any rates that may be filed under this authority, all such rates being subject to complaint, investigation and correction if in conflict with any provision of the Interstate Commerce Act."* [11] [12]

The appellants filed petitions for reconsideration of the action of both Boards. On August 27, 1957, Division 2 of the Commission acting as an Appellate upheld the action of the Board of Suspension by voting not to suspend the protested rate revision, and a notice to that effect was issued on the same date. The notice reminded the protestants that *"The action*

[10] Such a complaint may be filed with the Commission at any time—even today—under the authority of section 13(1) of the Interstate Commerce Act, 49 U.S.C. § 13(1).

[11] This clause usually concludes a fourth section order to place interested persons on notice that the rates established and maintained under the authority may be challenged in an appropriate complaint proceeding before the Commission. See *Intermountain Rate Cases* 234 U.S. 476, 493.

[12] The validity of the temporary fourth section order is not in issue here. Cf. *A. L. Mechling Barge Lines, Inc.* v. *U.S. and I.C.C.*, 368 U.S. 325 (1962). The fourth section order which is the subject of this appeal is based upon a full hearing and a report containing complete findings.

of the Board of Suspension and of Division 2 does not constitute approval of the protested schedules." The following day, August 28, 1957, the same Division of the Commission sustained the action of the Fourth Section Board. A notice of the Commission dated August 28, 1957, announcing action of Division 2 was issued and it also informed the protestants that *"The action of the Fourth Section Board and of Division 2 does not constitute approval of the rates. They may be subject to an investigation through formal complaint in accordance with the Commission's Rules of Practice."*

Although the appellants could have followed the advice of the Commission and filed a formal complaint against the 6-cent proportional rate factor, the appellants elected to challenge the Commission's action in court. On November 29, 1957, a three-judge statutory district court issued its order dismissing the complaints for lack of jurisdiction.[13]

In the meantime, the Commission set the rail carriers' application for fourth section relief for hearing before an examiner. Hearing was held January 29, 1958, through February 4, 1958, in which appellants fully participated.

On March 11, 1959, the report of the examiner was issued. Although the examiner recommended that the application be denied,[14] he recognized the need for a

[13] The case is entitled *A. L. Mechling Barge Lines, Inc., et al.* v. *United States and I.C.C.* et al., C.A. No. 57 C. 1450, U.S.D.C. N.D. Ill. E. Div. The position of the defendants in this case was that the plaintiffs had not exhausted their administrative remedies.

[14] The examiner recommended that the application be denied on the theory that the 6-cent proportional rate factor of the through rate, standing alone, was not reasonably compensatory.

rail rate adjustment to restore competition in this corn producing area, and that the adjustment would require fourth section relief.[13] With respect to Board of Trade's allegations of discrimination, the examiner held that "these issues [allegations] do not directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings." (M.J.S. App. E, p. 27a). Thus, appellant Board of Trade was again reminded of the appropriate procedure to be followed in seeking relief.

After the filing of exceptions and replies to the examiner's recommended report and upon the request of several of the parties, Division 2 of the Commission heard the parties in oral argument on October 29, 1959. Thereafter, the report of June 8, 1960, the subject of this appeal was issued by Division 2 which granted the application for fourth section relief. The accompanying Fourth Section Order No. 19346 states in part *"The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act."* (M.J.S. App. D, pp. 4a–5a.)

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[13] The examiner found that "It is clear that the competitive situation which prevailed prior to the proposed rate between the all-rail and the barge-rail rates on corn from the northern Illinois territory to the East required an adjustment in the all-rail, and that such an adjustment requires fourth section relief (M.J.S. App. E, pp. 27a–28a). Significantly, even the appellants acknowledged that the prevailing all-rail rate had to be reduced before the Belt Line could participate in the traffic (M.J.S. App. E, p. 30a).

Petitions for reconsideration of the report and order of Division 2 were denied by the Commission on November 18, 1960.[16]

In granting the application for fourth section relief, the Commission specifically found "that applicants have shown a special case within the meaning of section 4 of the act, by virtue of actual and compelling competition; that the proposed rates are not lower than necessary to meet that competition, do not constitute a destructive competitive practice, are reasonably compensatory, and will not impose an undue burden on other traffic" (M.J.S. App. C, p. 452). The finding, that the proposed rates were reasonably compensatory, was based upon the entire through rate from origins on the Belt Line to ultimate destinations in the east on the ground that the proportional "rate factor has no independent existence, but is an integral part of the rate which applies on the through transportation, from Belt origin, through the milling-in-transit point, to delivery of the corn product at its ultimate destination" (M.J.S. App. C, p. 450).[17]

Of primary significance in this case is the fact that pending the proceedings before the Commission, it had

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[16] In denying the appellants' petition for reconsideration, the Commission held that "the matters submitted in support thereof do not constitute substantial and material grounds to warrant reopening of this proceeding for reconsideration and reargument."

[17] In this connection, it must be noted that no fourth section departures occur on the inbound movement to a transit point such as Kankakee or Chicago. It is only when the reshipping rate is added to the inbound proportional rate to determine the through rate that the fourth section departures occur.

the opportunity to observe the effect of the 6-cent proportional rate effective December 15, 1956, upon the traffic of the competing barge line. Despite the restoration of effective competition, there was a substantial increase in the barge traffic to Chicago during the period December 15, 1956, to August 30, 1957, of about 90,000 tons over a corresponding period for the previous year. However, there was also a substantial increase in the amount of rail traffic originated on the Belt Line for a similar period.[13] After analyzing the corn movements in the Belt Line territory, the Commission was able to conclude that the new all-rail through rates attracted corn grown near the rail lines to the rails, whereas, corn grown in proximity to the river continued to be shipped by barge (M.J.S. App. C, p. 452).

The district court after careful review of the Commission's report concluded that the assailed order fell within the statutory power of the Commission, that its findings and conclusions were supported by substantial evidence of record, and that no prejudicial error occurred in the hearings before the examiner and the Commission (M.J.S. App. A, p. 8a).

The allegations of discrimination were discounted by the Commission when it pointed out that the proposed rates apply "from Belt points to eastern desti-

[13] For the period December 15, 1955–August 30, 1956, the barge shipments to Chicago amounted to 402,105 tons. It rose to 493,668 tons for the same period the following year. The 6-, 8-, and 12-month periods ending June 30, August 31, and December 31, 1957, show that Belt Line traffic progressively increased from 1,915 carloads of corn to 2,681 carloads (M.J.S. App. C, pp. 440–441, 452).

nations via either Kankakee or Chicago," (M.J.S. App. C, p. 449) and that "since the proposed rates are effective over Chicago, that point has the same stature as all other corn-processing points in official territory in their application" (M.J.S. App. C, p. 451). Although the Commission considered the allegations of discrimination raised before it and found them without merit, nevertheless, the district court held that Commission is not required to go beyond the statutory requirements of section 4 to make ultimate findings that "a rate is lawful and not discriminatory." (M.J.S. App. A, p. 4a.) In this respect, the district court held that the allegations of discrimination should have been raised under the complaint provisions of section 13(1) of the Interstate Commerce Act, 49 U.S.C. section 13(1) which is appropriate for that purpose (M.J.S. App. A, p. 4a)."

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court.

1. Pursuant to the provisions of section 4 of the Act, rail and water carriers subject to the Act are prohibited from charging or receiving from shippers, "any greater compensation in the *aggregate* for the transportation * * * like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance." (Italic sup-

[10] As of this date appellants have not filed a complaint against the rates filed under the permissive fourth section order of the Commission.

plied.) This is not intended to be an absolute and inflexible rule preventing the restoration of competition between competing carriers.[20] Indeed, the provisions of section 4 also enable a carrier affected by a transportation imbalance to seek its correction by the establishment of reduced rates applicable to critically competitive points on the long haul movement, while maintaining higher rates at the intermediate points which are not subjected to the same competitive forces. *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 568 (1919). Thus, Congress has provided in section 4, "That upon application to the Commission after investigation, such carrier, in *special cases* may be authorized to charge less for longer than for shorter distances for the transportation of * * * property * * * but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge *to or from the more distant point* that is not *reasonably compensatory* for the service performed" (Italic supplied). Section 4 also prohibits the Commission from approving an application for fourth section relief "on account of merely water competition not actually in existence."

By the terms of section 4, the necessity to meet water carrier competition is recognized as a *special* case. See also *In Re Louisville & Nashville R. R. Co.*, 1 I.C.C. 31, 78; *Intermountain Rate Cases*, 234 U.S.

[20] See Report of the Senate Select Committee on Interstate Commerce (Cullum Report), 49 Cong. 1st Sess. 1886, Vol. 1, pp. 195–198; and *In re Louisville & Nashville R.R. Co.*, 1 I.C.C. 31, 78 (1887).

476; *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 568; *Transcontinental Cases of 1922*, 74 I.C.C. 48. The record in this case demonstrates beyond doubt that there has been a substantial shift of traffic from the rail line to the barge lines operating on the Illinois River, to the extent that rail shipments of corn became almost non-existent. It was not simply water competition as Mechling alleges (M.J.S., p. 13) which justified the designation of this case as a "special" case, but it was water competition which resulted in the practical elimination of the Belt Line's participation in the corn traffic which justified the finding of the Commission.

The purpose of section 4 is to preserve competition, *Skinner & Eddy Corp.* v. *United States*, *supra*, and as the report of the Commission shows, competition between the rail and river transportation services which had disappeared, has been revived. All of the parties before the Commission, including the appellants, recognized that the all-rail rates had to be reduced if any corn traffic was to be attracted to the Belt Line. The only real question before the Commission was the level at which the rates were to be pegged. The Commission found that the proposed reduced all-rail rates were not lower than necessary to meet competition, and that they did not constitute a destructive competitive practice. The district court correctly held that there was substantial evidence of record to support these findings. (M.J.S. App. A, p. 8a).

Significantly, and as the district court noted (M.J.S. App. A, p. 8a) the "Commission had before

it evidence of the amount of corn shipped via the two modes of transportation in the period here in question." This evidence conclusively showed that the Belt Line, the farmers and the elevator operators in proximity to the Belt Line benefited substantially from the competitive all-rail rate, and at the same time, the barge lines not only retained their traffic, but enjoyed a sizeable increase as well. Certainly, this kind of competition cannot be labeled as "competition that kills;" *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557 at p. 568; nor can it be shown to violate either the express terms or the spirit of the National Transportation Policy, 49 U.S.C. preceding section 1. In this respect there is no substance to the appellants' allegations that the Commission action which resulted in the preservation of competition, is contrary to the National Transportation Policy.

2. In answer to the Board of Trade's allegation that the competitive all-rail rate unduly prejudiced Chicago in violation of section 3(1) of the Act, 49 U.S.C. section 3(1), the Commission expressly found that "the proposed rates apply from Belt points to eastern destination via either Kankakee or Chicago," and that "since the proposed rates are effective over Chicago, that point has the same stature at all other corn-processing points in official territory in their application." (M.J.S. App. C, pp. 449, 451.) This simply means that the Chicago shipper has available to it on corn milled-in-transit the same all-rail through rate of 54.5 cents for shipments from origins on the Belt Line via Chicago to eastern desti-

nations as the shipper which prefers the more direct route through Kankakee. The fact that the shipper at Chicago and at Kankakee receive equal treatment under the competitive all-rail through rate is clearly demonstrated by the Board of Trade in its third rate diagram (B.J.S., p. 6) which shows that on corn originating at Streator, Illinois, destined to New York, the same through rate of 54.5 cents applies whether the corn is milled-in-transit at Kankakee or Chicago.

The Board of Trade expressly admits that the Commission's findings of equal treatment are "technically correct." (B.J.S., p. 9). The only reasonable interpretation which can be placed upon its use of the phrase "technically correct" is that it is *legally correct.*

In view of the Board of Trade's admission that the Commission's findings are correct, its allegations that the Chicago grain interests are seriously injured (B.J.S., pp. 8-9), are completely without merit. The Board of Trade's third rate diagram (B.J.S., p. 6) shows that the same rail rate of 72.5 cents applied on whole corn shipments from Belt Line origins via Chicago and via Kankakee. Thus, as between the shippers of whole corn there is complete equality in the rail rates.

However, the Board of Trade omitted any reference to the much lower barge-rail rate applicable to Chicago which is not subject to the milling-in-transit limitation. In this respect, the Chicago grain dealers have a decided advantage over the Kankakee shippers.

Assuming the reverse situation to be true there might be some grounds for complaint. But where, as here, little or no corn moves on the 72.5 cent rail rate over the Belt Line, the Board of Trade is hardly in any position to claim that the Chicago grain dealer is unduly prejudiced. This is equally true of the Board of Trade's allegation that the routes over Kankakee are not as open and flexible as those available out of Chicago on the Chicago combinations. In addition, the mere fact that the application of competitive all-rail through rates results in a higher rate on whole corn is not, standing alone, a violation of the provisions of section 3(1) of the Act. *Interstate Commerce Commission* v. *Chicago Great Western Railway Company*, 209 U.S. 109 (1908).

The Commission found that all of these allegations by the Board of Trade "do not directly deal with the fourth section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings." (M.J.S. App. C, p. 451). The district court after considering the same allegations, as well as the appellants' argument, that the Commission could not grant the application under section 4, if to do so involved violation of the other sections of the Act, upheld the action of the Commission (M.J.S. App. A, p. 4a). The district court properly held that in an application proceeding limited to the standards of section 4 of the Act "the Commission is not required to make specific ultimate findings that a rate is lawful and not discriminatory" (M.J.S. App. A, p. 4a). Accordingly, the district

court concluded that the appellants had not been prejudiced by the exclusion of evidence which went beyond the requirements of section 4 of the Act, and that the appellants could have availed themselves of the remedies provided in section 13(1) and 15(1) of the Interstate Commerce Act, 49 U.S.C. section 13(1) and 15(1).[n] (M.J.S. App. A, pp. 3a–4a). Neither the record before the Commission nor the allegations of the Board of Trade indicate any violation of the provisions of section 3(1) of the Act. In this respect this case conforms to prior Commission cases in which it has declared that it would not grant applications for fourth-section relief where such relief results in infractions of other sections of the Act.

When the proposed all-rail rate adjustment was originally filed with the Commission in 1956 and 1957, the Commission pursuant to its discretionary authority in section 15(7) of the Interstate Commerce Act, 49 U.S.C. section 15(7), could have instituted an investigation into lawfulness of the proposed rates under other pertinent sections of the Act. In that event, it is the Commission's practice to combine such an investigation with the hearing on the application for fourth section relief. *Mississippi Railroad Commis-*

[n] The Board of Trade points out that, contrary to the district court's statement, the Commission had not excluded the evidence which was submitted to show that Chicago was unduly prejudiced by the proposed rate adjustment. This distinction is immaterial in view of the district court's conclusion that the appellants had not availed themselves of the appropriate statutory remedies and that they were not prejudiced by the action of the Commission.

sion v. *Alabama & Vicksburg Railway Company*, 120 I.C.C. 569, 573 (1927)."[22] Since the preliminary record before the Commission during the initial rate proceedings failed to justify the Commission taking such action, no investigation under sections 15(7) and 15(1) was ordered. Accordingly, there remained only the matter of the fourth section application for hearing.

However, the refusal of the Commission to institute a section 15 investigation, did not prevent the appellants from pursuing their remedies under section 13(1) of the Act by filing a complaint with the Commission and placing in issue their allegations of unlawful discrimination. Had this been done, the complaint proceeding would have been combined for hearing with the fourth section application. In these circumstances the district court's opinion is fully in accord with established precedent in *United States* v. *Merchants & M. Traffic Ass'ns*, 242 U.S. 177, 188 (1916); *Seatrain Lines* v. *United States*, 168 F. Supp. 819 (D.C. N.Y. 1958, 3 judge); *Koppers Co.* v. *United States*, 132 F. Supp. 159 (D.C. Pa. 1955, 3 judge); *Florida Citrus Commission* v.

[22] The Commission stated in this report at p. 573: "* * * It is desirable in the interest of economy of time and expense, wherever practicable, to hear and dispose of fourth-section applications in connection with formal complaints or investigations involving the same rate under other sections of the act. For that reason these portions of application No. 373 were set for hearing with certain of these cases. This policy has been followed for a number of years. So far as practicable it will be adhered to in the future, and we shall expect carriers to be ready to proceed in support of their fourth-section applications at the time set. * * *"

United States, 144 F. Supp. 517 (D.C. Fla. 1956, 3 judge) aff'd per curiam 352 U.S. 588. Merely because the appellants consider the statutory remedies and the Commission's time-tested procedures as "dryly technical formality" (M.J.S. p. 21) is not enough to justify circumvention of the established and appropriate remedies.[20] Appellants are only entitled to the right of redress by an effective procedure, *Gibbs* v. *Zimmerman*, 290 U.S. 326, 332. This has been provided by Congress in section 13(1) of the Act and the Commission's Rules of Procedure, 49 C.F.R. section 1.1 *et seq.* The court below correctly held that the appellants are required to adhere to statutory remedies.

The foregoing discussion applies with equal force to the allegations of section 3(4) discrimination made by Mechling which are of no greater merit than those advanced by the Board of Trade. (M.J.S., p. 19.) Mechling's allegations of a section 3(4) violation arising out of divisions of rates between connecting rail carriers at Chicago (M.J.S., p. 8), only one of a group of routes over which the proposed rates apply, is too remote from the issues presented by a section 4 application. In fact, many of the routes to which the rate applies do not go via Chicago. Clearly, divisions of rates between connecting carriers are completely disparate from the purpose of section 4 which is to prevent undue prefer-

[20] It should be noted that upon the filing of a complaint with the Commission, the burden of proving the allegation of discrimination would be on the appellants. *Koppers Company, Inc.* v. *United States*, 166 F. Supp. 96 (1958).

ence from "the charging of a less or an equal rate from longer haul or route," *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 638, than for a shorter haul, and thereby unduly prejudicing shippers and localities at the intermediate points. *United States* v. *Merchant & M. Traffic Ass'ns*, 242 U.S. 177; *Seatrain Lines* v. *United States*, 168 F. Supp. 819.

In all of the cases cited by the appellants in which the Commission has stated that in granting section 4 relief that consideration should be given to the provisions of sections 2 and 3, this statement was made in relation to the affect of the relief upon intermediate shippers and localities and competing shippers. Indeed, this Court's opinion in the *Intermountain Rate Cases*, 234 U.S. 476, is not to the contrary. We know of no case in which the Commission has denied fourth section relief because of alleged violations of section 3(4). Since the issues under section 3(4) are completely extraneous to the section 4 issues, i.e., whether a "special case" exists and whether the proposed rates are "reasonably compensatory" it was not error on the part of the Commission to exclude matter arising under section 3(4).

3. Since it was evident that a special case existed, the only remaining issue to be disposed of by the Commission was whether the reduced through charges applicable to the long-haul movement from Belt Line origins to eastern destinations were reasonably compensatory. In order to resolve this question, the Commission based its determination on the through rate rather than the 6-cent proportional rate factor because, as the Commission found, "that rate factor

has no independent existence, but is an integral part of the rate which applies on the through transportation from Belt origins, through the milling-in-transit point, to delivery of the corn product at its ultimate destination." (M.J.S. App. C, p. 450.) The 6-cent proportional rate factor has no independent application to shipments from the stations on the Belt Line to the transit points. No fourth section departures occur at points between Belt Line origins and the transit points. It is only after reshipment when the proportional rate factor is used to determine the through charge that fourth section departures occur."

Appellants' allegations that the Commission should have confined its consideration to the 6-cent inbound proportional rate is illogical. It is premised upon a distorted interpretation of the provision of section 4. The provisions of section 4 are intended to prevent carriers from engaging in discriminatory practices in which the long-haul shipper obtains a rate advantage over competing short-haul shippers. *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 638. Thus, the statute speaks in terms of "compensation in the aggregate" and "the establishment of any charge to or from the more distant point." The 6-cent proportional rate is neither the compensation in the aggregate charged for the longer distance, nor is it the charge to or from the more distant point."

"Appellants did not challenge the compensativeness of the through charges.

"In this respect, Fourth Section Order No. 19346 which accompanied the assailed report authorized the applicant rail carrier to establish the proposed rate adjustment from points on the Blackstone Belt Line to points in Central trunk line and New England territories. (M.J.S. App. D, pp. 4a–5a.)

The legislative history cited by Mechling does not lend any support to its allegations. (M.J.S., pp. 14–15.) In discussing his proposed amendment to section 4 which included the proviso for a "reasonably compensatory charge for the service performed," Senator Townsend concluded by noting that the Commission for all practical purposes was observing the requirements of the proposed amendment. 59 Cong. Rec., pp. 740, 741, Dec. 17, 1919. The rule observed by the Commission at that time and which is followed today is succinctly stated in *Proportional Rates to Gulf Ports for Export*, 44 I.C.C. 543 (1917) where the Commission said at p. 547:

> In view of all the circumstances we hold that the fourth section as amended in 1910 should be construed as applying to carriers participating in a through route; and that the through route, being considered as a unit, must be dealt with as such, and that the Commission has not exceeded its powers in granting the fourth section exemption herein involved. * * *

Shortly after the enactment of the 1920 amendment to section 4, the Commission in *Transcontinental Cases of 1922*, 74 I.C.C. 48, remarked at p. 70, "The amendment has made mandatory what theretofore rested in our sound discretion as to compensation for the service performed to the more distant point * * *."

The Commission found that the through rates were reasonably compensatory. In making this determination, the Commission considered evidence of comparative earnings, rate levels and operating conditions. (M.J.S. App. C, pp. 448–449). Pertinent to its de-

cision was the finding that under the proposed rates the New York Central's revenues are increased by 7.5 cents per 100 pounds over its prior method of handling corn, and that its expenses are reduced to the extent that corn from Belt origins can move direct to eastern destinations. (M.J.S. App. C, p. 449).

The ultimate findings of the Commission are in complete accord with the established criteria for the determination of a reasonably compensatory rate which the Commission set forth in *Transcontinental Cases of 1922*, 74 I.C.C. 48, 71 (M.J.S. App. A. p. 7a). The district court held that the Commission was correct in basing its decision on the through combination rate and not the 6-cent proportional rate factor, and that the Commission's findings and conclusions are based upon substantial evidence of record." (M.J.S. App. A, pp. 6a-8a.)

CONCLUSION

Since this appeal presents no issues warranting plenary consideration, the judgment of the court below should be affirmed.

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Interstate Commerce Commission.

MAY 1963.

" The suggestion by the Board of Trade that the present case is of far reaching importance because it has affected "at least in part" several section 15 rate investigation proceedings pending before the Commission is hardly enough to warrant further consideration by this Court.

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